

PP v. AHMAD JUWENI & ANOTHER APPEAL

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COURT OF APPEAL, PUTRAJAYA

MOHTARUDIN BAKI JCA

ABDUL RAHMAN SEBLI JCA

AB KARIM AB JALIL JCA

[CRIMINAL APPEALS NO: B-05-287-10-2014 (IDN)

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& B-05(SH)-228-09-2015]

9 MARCH 2017

CRIMINAL PROCEDURE: Appeal – Appeal against conviction and sentence – Accused person charged for two counts of trafficking drugs – Dangerous Drugs Act 1952, s. 39B(1)(a) – Defence of innocent carrier – Whether defence probable – Whether accused person had knowledge of drugs – Accused person sentenced to 16 years imprisonment and ten strokes of rotan and 14 years imprisonment and ten strokes of rotan – Whether punishment manifestly harsh

C

CRIMINAL PROCEDURE: Appeal – Appeal by prosecution – Accused person charged for two counts of trafficking drugs – Dangerous Drugs Act 1952 – Accused person established to be in mens rea possession and had knowledge of drugs and act of carrying drugs was act of trafficking – Trial judge failed to invoke presumption under s. 37(da) of Dangerous Drugs Act 1952 – Defence of innocent carrier – Accused acquitted of both charges and found guilty of possession – Whether trafficking charges proved – Presumptions under ss. 37(d) and 37(da) of Dangerous Drugs Act 1952

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The respondent, an Indonesian, was charged at the High Court under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') for two counts of drug-trafficking. The drugs were found in a bag that he was carrying at Kuala Lumpur International Airport. At the close of the prosecution's case, it was established that (i) the respondent was in *mens rea* possession and had knowledge of the drugs; and (ii) his act of carrying the drugs was an act of trafficking. However, the trial judge did not invoke the presumption under s. 37(da) of the DDA. The respondent was called to enter his defence. The respondent maintained that he had no knowledge of the drugs in the bag and that he was an innocent carrier. According to him, he was merely taking instructions from one Ibu Anita, the so-called real trafficker, who had allegedly given him a bag containing cloths which he was to bring back to Indonesia. At the end of the trial, the respondent was acquitted of both charges as the trial judge found that he was only guilty of possession, an offence under s. 39A(2) of the DDA and not the offence of trafficking as charged. In finding the respondent to be an innocent carrier, the trial judge sentenced him to (i) 16 years imprisonment and ten strokes of rotan for the first charge; and (ii) 14 years imprisonment and ten strokes of rotan for the second charge. Dissatisfied, the Public Prosecutor filed the present appeal on

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- A the ground that the trial judge erred in finding the trafficking charges had not been proved. The respondent counter-appealed and argued that (i) the trial judge erred in convicting him for the offence of possession when His Lordship made a finding that he had no knowledge of the drugs and had successfully rebutted the presumption under s. 37(d) of the DDA; (ii) there was non-compliance with s. 402B of the Criminal Procedure Code; and (iii) the sentence was manifestly harsh.

Held (allowing appeal; convicting respondent of offences charged and sentencing him to death)

Per Abdul Rahman Sebli JCA delivering the judgment:

- C (1) The presumptions under s. 37(d) and (da) of the DDA are not interdependent, nor are they interconnected. In fact, they operate independently of each other. They presume different facts and are triggered by different factual elements. Section 37(d) presumes 'possession' and 'knowledge' of the nature of the drugs and is triggered by mere proof of physical possession. On the other hand, to activate the presumption of trafficking under s. 37(da), more than mere physical control is required. Over and above physical custody or control, the prosecution needs to prove the mental element of possession. (paras 30 & 31)
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- E (2) Despite finding that the respondent was in *mens rea* possession of the drugs, the trial judge did not invoke the presumption under s. 37(da) of the DDA and no reason was given for the omission. This was wrong because once *mens rea* possession of the drugs had been found against the respondent, it was incumbent on the trial judge to invoke the presumption under s. 37(da) of the DDA. (para 15)
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- G (3) The presumption of trafficking under s. 37(da) of the DDA is a rebuttable presumption. The only option open to the respondent in answer to the trafficking charges was to put up the defence that the drugs were not for the purpose of trafficking, in rebuttal of the presumption under s. 37(da). The defence of innocent carrier, which was put up by the respondent, was not a defence raised to rebut the presumption of trafficking under s. 37(da). There is difference between saying that a person had no knowledge of the drugs and saying the drugs were not for the purpose of trafficking. A person who traffics necessarily has knowledge of the drugs but a person who has no knowledge of the drugs is not only not trafficking in the drugs but he is not even in possession of the drugs as the word is understood in criminal law, *ie*, physical possession with knowledge. (paras 16, 19, 22, 23 & 24)
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- (4) The defence of no knowledge of the drugs necessarily brings into play the presumption under s. 37(d) of the DDA which provides that upon proof of custody or control of anything containing any dangerous drugs, the person is deemed to have known the nature of the drugs. The respondent was deemed to have known that what he was carrying in the bag was drugs until the contrary is proved by him. The deemed knowledge of the nature of the drugs under s. 37(d) clearly applied against the respondent as the evidence was irrefutable that the bag containing the dangerous drugs was in his custody or under his control. (paras 27 & 38) A B
- (5) The respondent failed to rebut the presumption of knowledge under s. 37(d) on the balance of probabilities which was the defence that he chose to put up in answer to the *prima facie* case of trafficking established against him at the close of the prosecution's case. He knew what he was carrying. Nor had the respondent's explanation succeeded in raising any reasonable doubt in the prosecution's case. The trafficking charges had therefore been proved beyond reasonable doubt. (paras 70 & 71) C D
- (6) In view of the decision on the Public Prosecutor's appeal, it was unnecessary to deal with the respondent's counter appeal save to say that the issues raised would only be relevant if the prosecution's appeal was dismissed. (para 73) E

Bahasa Malaysia Headnotes

Responden, seorang warganegara Indonesia, dihadapkan ke Mahkamah Tinggi atas dua pertuduhan mengedar dadah yang menjadi kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dadah tersebut dijumpai dalam beg yang dibawanya di Lapangan Terbang Kuala Lumpur. Pada penghujung kes pendakwaan, terbukti bahawa (i) responden mempunyai milikan *mens rea* dan pengetahuan tentang dadah tersebut; dan (ii) tindakannya membawa dadah tersebut membentuk satu tindakan pengedaran. Walau bagaimanapun, hakim bicara tidak membangkitkan anggapan bawah s. 37(da) ADB. Responden dipanggil membela diri. Responden menyatakan dia tiada pengetahuan tentang dadah yang dijumpai di dalam beg dan dia adalah pembawa tidak bersalah. Menurutnya lagi, dia sekadar bertindak atas arahan seorang bernama Ibu Anita, yang dikatakan pengedar sebenar, yang memberinya sebuah beg berisi pakaian untuk dibawa pulang ke Indonesia. Pada penghujung perbicaraan, responden dilepaskan daripada kedua-dua pertuduhan kerana hakim bicara berpendapat dia hanya bersalah bagi milikan, satu kesalahan bawah s. 39A(2) ADB dan bukan pertuduhan pengedaran seperti yang dipertuduh. Dalam mendapati responden adalah pembawa tidak bersalah, hakim bicara menjatuhkan atasnya hukuman berbentuk (i) penjara 16 tahun dan sepuluh sebatan rotan bagi pertuduhan pertama; dan (ii) penjara 14 tahun dan sepuluh sebatan rotan F G H I

- A bagi pertuduhan kedua. Tidak berpuas hati, Pendakwa Raya memfailkan rayuan ini atas alasan hakim bicara terkhilaf dalam memutuskan kedua-dua pertuduhan pengedaran gagal dibuktikan. Responden merayu balas dan menghujahkan (i) hakim bicara terkhilaf dalam mensabitkannya bagi kesalahan milikan sedangkan beliau membuat dapatan responden tiada pengetahuan tentang dadah dan berjaya menyangkal anggapan bawah s. 37(d) ADB; (ii) s. 402B Kanun Tatacara Jenayah gagal dipatuhi; dan (iii) hukuman yang dijatuhkan terlampau berat.
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Diputuskan (membenarkan rayuan; mensabitkan responden atas pertuduhan dan menjatuhkan hukuman mati atasnya)

- C **Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:**

- (1) Anggapan bawah s. 37(d) dan (da) tidak saling bergantung dan tidak saling berkait. Malah operasi kedua-duanya bebas daripada satu sama lain. Kedua-duanya membangkitkan anggapan bagi fakta berlainan dan dibangkitkan oleh elemen fakta berbeza. Seksyen 37(d) membangkitkan anggapan milikan dan pengetahuan sifat dadah dan dibangkitkan oleh milikan fizikal semata-mata. Sebaliknya, untuk membangkitkan anggapan pengedaran bawah s. 37(da), lebih daripada sekadar kawalan fizikal diperlukan. Lebih daripada jagaan atau milikan fizikal, pihak pendakwaan perlu membuktikan elemen mental milikan.
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- (2) Walaupun responden mempunyai *mens rea* milikan dadah, hakim bicara tidak membangkitkan anggapan bawah s. 37(da) ADB dan tidak mengemukakan alasan bagi ketinggalan ini. Ini satu kekhilafan kerana apabila *mens rea* milikan dadah diputuskan terhadap responden, hakim bicara wajib membangkitkan anggapan bawah s. 37(da) ADB.
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- (3) Anggapan pengedaran bawah s. 37(da) ADB adalah anggapan yang boleh disangkal. Satu-satunya pilihan yang ada buat responden untuk menjawab pertuduhan pengedaran ialah mengemukakan pembelaan bahawa dadah tersebut bukan bagi tujuan pengedaran, sebagai menyangkal anggapan bawah s. 37(da). Pembelaan pembawa tidak bersalah yang dikemukakan oleh responden bukan pembelaan untuk menyangkal anggapan pengedaran bawah s. 37(da). Terdapat perbezaan antara mengatakan seseorang tiada pengetahuan tentang dadah dan mengatakan dadah tersebut bukan bagi tujuan pengedaran. Seorang yang mengedar dadah semestinya mempunyai pengetahuan tentang dadah tetapi seseorang yang tiada pengetahuan tentang dadah bukan sahaja tidak mengedar dadah bahkan dia tidak memiliki dadah tersebut dalam erti kata yang difahami bawah undang-undang jenayah iaitu milikan fizikal berserta pengetahuan.
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- (4) Pembelaan tiada pengetahuan tentang dadah tentu sekali membangkitkan anggapan bawah s. 37(d) ADB yang memperuntukkan bahawa apabila terbukti jagaan atau kawalan apa-apa yang berisi dadah, orang tersebut dianggap tahu tentang sifat dadah. Responden dianggap tahu apa yang dibawa dalam begnya adalah dadah hinggalah dia berjaya membuktikan sebaliknya. Anggapan pengetahuan tentang sifat dadah bawah s. 37(d) ini jelas terpakai terhadap responden kerana bukti tidak boleh disangkal bahawa beg berisi dadah berbahaya tersebut dalam jagaan dan kawalannya. A
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- (5) Responden gagal membangkitkan anggapan pengetahuan bawah s. 37(d) atas imbangan kebarangkalian iaitu pembelaan yang dikemukakan untuk bagi menjawab kes *prima facie* pengedaran yang terbukti terhadapnya pada penghujung kes pendakwaan. Dia tahu apa yang dibawanya. Penjelasan responden juga tidak berjaya membangkitkan keraguan munasabah terhadap kes pendakwaan. Oleh itu, pertuduhan pengedaran berjaya dibuktikan melampaui keraguan munasabah. C
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- (6) Berdasarkan keputusan rayuan Pendakwa Raya, tiada keperluan untuk memutuskan tentang rayuan balas responden kecuali untuk mengatakan bahawa isu yang dibangkitkan hanya relevan jika rayuan pendakwaan ditolak. E

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC (*refd*)
Chan Pean Leon v. PP [1956] 1 LNS 17 HC (*refd*)
Cohen Lorraine Philis & Anor v. PP [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18 SC (*refd*)
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC (*refd*)
Fakhrurrazi Hasan v. PP [2017] 2 CLJ 125 FC (*refd*) F
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC (*refd*)
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC (*refd*)
Miller v. Minister of Pensions [1947] 2 All ER 372 (*refd*)
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC (*refd*)
Ng Chai Kem Iwn. PP [1994] 2 CLJ 593 SC (*refd*)
Ng Eng Kooi & Anor v. PP [1970] 1 LNS 86 FC (*refd*) G
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC (*refd*)
PP v. Yuvaraj [1968] 1 LNS 116 PC (*refd*)
PP v. Zulkifli Arshad [2010] 6 CLJ 121 FC (*refd*)
Zulfakar Mustaffah v. PP [2001] 1 SLR 633 (*refd*)

Legislation referred to:

Criminal Procedure Code, ss. 182A(1), 402B H
 Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 37A, 39A(2), 39B(1)(a)
 Evidence Act 1950, s. 113

For the prosecution - Tetralina Ahmed Fauzi; DPP

For the respondent - Selvi Sandrasegaram & Loke Kok Mun; M/s Gooi & Azura

Reported by Najib Tamby I

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JUDGMENT

Abdul Rahman Sebli JCA:

[1] In the High Court at Shah Alam, Indonesian, Ahmad Juweni was charged with two counts of drug trafficking and the charges against him were as follows:

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First charge

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Bahawa kamu pada 13 Oktober 2012, lebih kurang jam 6.30 pagi di Cawangan Pemeriksaan Penumpang 2 (CPP2), Terminal Pengangkutan Tambang Murah (LCCT), Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam daerah Sepang, dalam negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu Heroin seberat 630.4 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

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Second charge

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Bahawa kamu pada 13 Oktober 2012, lebih kurang jam 6.30 pagi di Cawangan Pemeriksaan Penumpang 2 (CPP2), Terminal Pengangkutan Tambang Murah (LCCT), Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam daerah Sepang, dalam negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu Monoacetylmorphines seberat 112.3 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

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[2] He claimed trial to the charges at the conclusion of which he was acquitted of both. The learned trial judge found that he was only guilty of possession, an offence punishable under s. 39A(2) of the Dangerous Drugs Act 1952 ("the DDA") and not the offence of trafficking as charged. The learned judge then sentenced him to 16 years imprisonment and ten strokes of the rotan for the first charge and 14 years imprisonment and ten strokes of the rotan for the second charge. The imprisonment sentences were ordered to run concurrently.

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[3] Dissatisfied with the decision, the Public Prosecutor appealed to this court, on the principal ground that the learned trial judge was wrong in finding that the trafficking charges had not been proved. The respondent on his part counter-appealed on the following grounds:

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(a) That the learned judge erred in convicting him for the offence of possession when he had made a finding that he had no knowledge of the drugs and had successfully rebutted the presumption under s. 37(d) of the DDA;

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(b) There was non-compliance with s. 402B of the Criminal Procedure Code;

(c) The sentence was manifestly harsh.

[4] Having heard arguments, we unanimously allowed the Public Prosecutor's appeal, convicted the respondent of the offences charged and sentenced him to death. The respondent's appeal against conviction and sentence for the offence of possession was dismissed. These are our grounds.

A

[5] The complaint by the Public Prosecutor was that the learned trial judge was wrong in finding the respondent to be an 'innocent carrier' and therefore not guilty of trafficking but only guilty of 'passive possession'. According to the learned DPP this amounted to an about turn by the learned judge of his finding at the close of the prosecution's case that the respondent's act of carrying the drugs was an act of trafficking within the meaning of s. 2 of the DDA.

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[6] It was argued that the learned judge could not revisit his finding on the issue of trafficking as his duty at the close of the defence case was only to consider whether the respondent's explanation had cast a reasonable doubt in the prosecution's case. Reliance was placed on the decision of the Federal Court in *Duis Akim & Ors v. PP* [2013] 9 CLJ 692 where Richard Malanjum CJ (Sabah and Sarawak) delivering the judgment of the court said:

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[38] We note that when assessing the defence the learned trial judge surprisingly revisited his earlier findings upon which he called for the defence. Such approach is quite contrary to the principle of maximum evaluation of the evidence adduced at the close of the prosecution's case. Indeed in his judgment the learned trial judge made it very clear that he had conducted a maximum evaluation of the evidence adduced by the prosecution before calling for the defence.

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[39] In *PP v. Khong Soh* [1966] 1 LNS 141; [1966] 2 MLJ 137 Macintyre J said this at p. 139:

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Having held that a *prima facie* case had been made out against the respondent, the learned president should have given his reasons for holding why the respondent's evidence had created a reasonable doubt in his mind.

[40] Thus, in the present case the learned trial judge, having given the evidence before him the maximum evaluation before calling for the defence, should have therefore focused on whether the defence had cast a reasonable doubt in the prosecution's case and even if it did not, whether as a whole the prosecution had proved its case beyond reasonable doubt before finding the appellants innocent or guilty for the offence as charged.

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[7] The learned trial judge had said this in his grounds of judgment:

Definisi 'trafficking' di bawah Seksyen 2 Akta, tidak menyatakan bahawa 'possession' adalah termasuk dalam takrifan mengedar. Namun jika dapat dibuktikan bahawa Tertuduh telah membawa dadah-dadah tersebut dari satu tempat ke tempat yang lain, ianya adalah terjumlah kepada perbuatan mengedar. (Lihat keputusan kes *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64).

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- A Dengan mengaplikasikan prinsip yang diputuskan di dalam kes *Ong Ah Chuan (supra)* mengenai membawa dadah untuk pengedaran dan tidak ada kemungkinan jumlah dadah yang banyak iaitu Heroin seberat 630.4 gram dan Monoacetylmorphines seberat 112.3 gram akan digunakan oleh
- B Tertuduh untuk diri sendiri, ia adalah dibuat agihan atau edaran kepada pihak lain, maka hujahan pihak pendakwaan bahawa satu kesalahan mengedar telah dilakukan oleh Tertuduh, jelas megandungi meritnya. (emphasis added)

[8] Having regard to the rebuttable nature of the presumption under s. 37(da), we were unable to agree with the learned DPP. Clearly it was incumbent on the learned judge to revisit the issue as it was his duty at the conclusion of the trial to consider all the evidence adduced before him as required by s. 182A(1) of the Criminal Procedure Code and this includes the question of whether the respondent had succeeded in rebutting the presumption of trafficking or any other defence that the respondent had put up.

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- D [9] It is in this context that the Federal Court decision in *Duis Akim (supra)* must be understood. That was a murder case which did not involve any presumption of law. The only issue for the trial judge in that case to consider at the close of the defence case was whether the appellant had cast a reasonable doubt in the prosecution's case, particularly on the issue of his
- E identity as the assailant and even if he did not, whether as a whole the prosecution had proved its case beyond reasonable doubt. The question of whether the appellant had a legal burden to prove any fact in issue, least of all to prove that he did not commit the murder, did not arise at all.

- F [10] On the issue of knowledge, this is what the learned judge said:

Elemen "Pemilikan" tidak didefinisikan di bawah Akta Dadah Berbahaya 1952. Namun kedudukan Undang-Undang adalah mantap iaitu bagi pembuktian "Pemilikan", perlulah dibuktikan wujudnya juga elemen pengetahuan selain dari elemen yang seseorang itu mempunyai kawalan dan jagaan terhadap dadah-dadah tersebut.

- G Dari aspek pengetahuan pula, untuk menghubungkan Tertuduh sebagai mempunyai pengetahuan terhadap dadah-dadah jenis Heroin dan Monoacetylmorphines tersebut, apa yang diujahkan oleh pihak Pendakwaan ada meritnya bilamana diujahkan dengan memetik prinsip kes *Gunalan a/l Ramachandran & Ors v. PP* [2004] 4 MLJ 489, di mana diputuskan:
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Knowledge is to be inferred from the fact and the surrounding circumstances of the case.

- I Keterangan menunjukkan bahawa keadaan dadah yang disimpan dengan selamat dan rapi di dalam begasi P11 itu, juga **menunjukkan bahawa Tertuduh tahu di dalamnya ada terdapat dadah berbahaya**. Cara

penyimpanan yang begitu rapi itu jelas memperlihatkan bahawa barang itu adalah barang yang terlarang dan kandungannya perlu disorok untuk mengelak daripada dikesan oleh pihak berkuasa. (emphasis added) A

[11] It is thus clear that at the close of the prosecution's case, the following primary facts had been established against the respondent, namely: (1) he was in *mens rea* possession of the drugs, ie, possession with knowledge and; B
(2) his act of carrying the drugs was an act of trafficking.

[12] The consequence of such findings, if the respondent had elected to remain silent when called upon to state his defence, would have been a conviction under s. 39B(1)(a) for each of the charges and not a conviction for the lesser offence of possession punishable under s. 39A(2): *Balachandran v. PP* [2005] 1 CLJ 85. In *Junaidi bin Abdullah v. PP* [1993] 4 CLJ 201 the then Supreme Court held as follows at p. 206: C

By calling an accused to enter his defence, the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at the close of the prosecution's case, established a *prima facie* case which, if un rebutted, would warrant a conviction of the accused. D

[13] In any event, since the respondent was in *mens rea* possession of the drugs (as found by the learned judge), he was presumed by s. 37(da) to be trafficking in the drugs as the weights were in excess of the minimum prescribed by law, which is 15g for both types of drug. The prosecution had no duty to prove that the drugs were for the purpose of trafficking. The law presumes that they were for that purpose. Section 37(da) reads as follows: E

37. In all proceedings under this Act or any regulation made thereunder:

(da) any person who is found in possession of: F

(i) 15 grammes or more in weight of heroin;

(ii) ...

(iii) 15 grammes or more in weight of monoacetylmorphines;

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug; (emphasis added) G

[14] The word 'presumed' means to accept legally or officially that something is true until it is proved to be not true; to suppose to be true without proof: *Merriam-Webster Dictionary*. In this case the heroin weighed 630.4g (the first charge) and the monoacetylmorphines weighed 112.3g (the second charge) and the respondent had no lawful authority to possess them. So in law it must be accepted as true without proof by the prosecution that the respondent was trafficking in the drugs until he proved that they were not for that purpose. Such proof could come from the prosecution's own evidence, but there was none in this case. H
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- A [15] Despite finding that the respondent was in *mens rea* possession of the drugs, the learned judge did not invoke the presumption and no reason was given for the omission. This is wrong because once *mens rea* possession of the drugs had been found against the respondent, it was incumbent on him to invoke the presumption under s. 37(da): See *PP v. Zulkifli Arshad* [2010] 6 CLJ 121 where the Federal Court decided at p. 133:
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The same applies to the failure of the Court of Appeal for not applying the presumption under s. 37(da)(vi). Be that as it may, we feel that on the evidence adduced by the prosecution, and upon the failure by the learned trial judge as well as the Court of Appeal to invoke the presumption, it is incumbent upon us to do so in accordance with the provision of s. 37(da)(vi) of the Act.

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- [16] But this is not to say that just because the presumption of trafficking under s. 37(da) had been activated, the only option open to the respondent in answer to the trafficking charges was to put up the defence that the drugs were not for the purpose of trafficking, in rebuttal of the presumption under s. 37(da). It was entirely for him to decide on his line of defence.
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- [17] He could decide to put up the defence that the drugs were not for the purpose of trafficking in rebuttal of the presumption under s. 37(da), or he could put up the defence of no knowledge of the drugs in rebuttal of the presumption under s. 37(d), or he could put up the defence that he was not even in custody or control of the drugs, ie, that he was not even in physical possession of the drugs.
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- [18] If he decided to put up the last of the defences mentioned above, he would have no legal burden to prove that he was not in custody or control of the drugs because there is no presumption of custody or control. The presumption is from custody or control. All that he needed to do in order to earn an acquittal was to discharge his evidential burden of merely to raise a reasonable doubt in the prosecution's case as to whether or not he was in physical custody or control of the drugs.
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- G [19] The presumption of trafficking under s. 37(da) is of course a rebuttable presumption, unlike, for example the presumption under s. 113 of the Evidence Act 1950 which provides as follows:

It shall be an irrebuttable presumption of law that a boy under the age of thirteen years is incapable of committing rape.

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- I [20] Thus, if the respondent succeeded in proving, on the balance of probabilities, that the drugs were not for the purpose of trafficking but for some other purpose other than trafficking, such as for his own personal consumption, or, to give another example, to be handed over to the police upon discovering that they were dangerous drugs, he would be entitled to be acquitted of the trafficking charges. But if he failed to rebut the presumption,

the consequence would be a conviction: See *PP v. Yuvaraj* [1968] 1 LNS 116; [1962] 2 MLJ 189 where the Judicial Committee of the Privy Council through Lord Diplock laid down the following proposition of law:

Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are “not proved”. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist “unless the contrary is proved”. *In such a case the consequence of finding that that particular fact is “disproved” will be an acquittal, whereas the absence of such finding will have the consequence of a conviction.* (emphasis added)

[21] The case, a corruption case which emanated from the Sessions Court at Batu Pahat Johor, was cited with approval by the Federal Court in *Ng Eng Kooi & Anor v. PP* [1970] 1 LNS 86; [1970] 1 MLJ 267 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 and by the then Supreme Court in *Cohen Lorraine Philis & Anor v. PP* [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18 and *Ng Chai Kem lwn. PP* [1994] 2 CLJ 593. In *Cohen Lorraine Philis*, which is a drug trafficking case, the Supreme Court recognised that the law on statutory presumptions as stated in *PP v. Yuvaraj* has become “part of our law”.

[22] In the present case, although the respondent was called upon to answer two trafficking charges and was presumed by law to be trafficking in the drugs, he did not put up the defence that the drugs were not for the purpose of trafficking. That was his right and that was his choice. The defence that he put up was the defence of ‘innocent carrier’.

[23] The defence of ‘innocent carrier’ or ‘passive possession’ as it is sometimes described as, is in truth a defence of no knowledge of the presence of the drug. It is not a defence that is raised with the object of rebutting the presumption of trafficking under s. 37(da), ie, that the drug was not for the purpose of trafficking.

[24] There is a difference between saying that a person had no knowledge of the drug and saying that the drug was not for the purpose of trafficking. A person who traffics necessarily has knowledge of the drug but a person who has no knowledge of the drug is not only not trafficking in the drug but he is not even in “possession” of the drug as the word is understood in criminal law, ie physical possession with knowledge.

[25] The defence that the drug was not for the purpose of trafficking is only a partial defence. By putting up such defence, the accused does not avoid liability altogether because he admits having knowledge of the drug, except

A that it was not for the purpose of trafficking. Thus, even where he succeeds in rebutting the presumption of trafficking, he is still liable to be convicted, but only for the lesser offence of possession and not trafficking.

B [26] The defence of having no knowledge of the presence of the drug, such as the defence that the respondent put up in the present case, is a different proposition altogether. Such defence is a total avoidance of criminal liability as the accused expects a complete acquittal because if he succeeds in proving that he had no knowledge of the drug, he is not only entitled to be acquitted of the trafficking charge but is also not liable to be convicted of the lesser offence of possession because knowledge is an essential ingredient of both the
C offence of trafficking and the offence of possession. This is precisely what the respondent contended in his counter-appeal referred to in para. 3(1) above.

D [27] The defence of no knowledge of the drug necessarily brings into play the presumption under s. 37(d), which provides that upon proof of custody or control of anything containing any dangerous drug, the person is deemed to have known the nature of the drug: See *Fakhrurrazi Hasan v. PP* [2017] 2 CLJ 125 FC. In the context of the present case, the respondent was deemed to have known that what he was carrying in the bag was heroin and methamphetamine, “until the contrary is proved” by him. We reproduce below s. 37(d) of the DDA:

E 37(d) any person who is found to have in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, **be deemed to have known the nature of such drug.** (emphasis added)

F [28] The word “possession” in the first part of s. 37(d) above is not free from ambiguity, and it does not help that the word is not defined anywhere in the DDA. If it means *mens rea* possession, ie, possession with both the physical and mental elements as decided by case law (*Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 22 MLJ 28, *Chan Pean Leon v. PP* [1956]
G 1 LNS 17; [1956] 22 MLJ 23 etc), then it is hard to comprehend why it is necessary to again presume knowledge of the drug in the second part of the same section, never mind that it refers specifically to having had knowledge of the nature of the drug.

H [29] The ambiguity can be avoided if the first part of s. 37(d) presumes knowledge rather than “possession”. If it presumes knowledge instead of “possession”, the problem that manifested itself in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 could probably be avoided because what happened in that case was that the word “possession” in the first part of s. 37(d) was used as a rider to the word “possession” in s. 37(da), with the effect that the
I presumed “possession” under s. 37(d) was used to activate the presumption of trafficking under s. 37(da), thus making it a presumption upon presumption.

- [30] It is important to appreciate that the presumptions under ss. 37(d) and 37(da) are not interdependent, nor are they interconnected. In fact they operate independently of each other. They presume different facts and are triggered by different factual elements. A
- [31] Section 37(d) presumes “possession” and “knowledge” of the nature of the drug and is triggered by mere proof of physical possession, ie, custody or control of anything whatsoever containing any dangerous drug whereas to activate the presumption of trafficking under s. 37(da), more than mere physical custody or control is required. Over and above physical custody or control, the prosecution needs to prove the mental element of possession, ie, knowledge of the drug either by direct evidence or by inference. B C
- [32] Surely, to be deemed to have known the nature of the drug as provided by the second part of s. 37(d) is more onerous than being deemed to be merely in “possession” of the drug as provided in the first part. Common sense will tell us that if a person is in custody or control of the drug, he is already in physical possession of the drug. D
- [33] It would therefore be illogical to suggest that the intention behind the first part of s. 37(d) is to also presume the physical element of “possession”. What s. 37(d) seeks to presume upon proof of custody or control, ie, physical possession of the drug, is the mental element of possession, and this is achieved by presuming knowledge of the nature of the drug in the second part. E
- [34] In our view, so long as the presumption of “possession” in the first part of s. 37(d) is not used to activate the presumption of “trafficking” under s. 37(da) as happened in *Muhammed Hassan v. PP (supra)*, there is nothing wrong to apply the presumption of knowledge of the nature of the drug in the second part of s. 37(d) together with the presumption of trafficking under s. 37(da) at the close of the prosecution’s case, even without the new s. 37A, which came into force on 15 February 2014. F
- [35] The simultaneous application of these two presumptions will not run foul of the rule against double presumption as it will not amount to a presumption upon presumption, which is prohibited: *Muhammed Hassan (supra)*. In any case, to be presumed to have known the nature of the drug under the second part of s. 37(d) has nothing to do with being presumed to be trafficking in the drug under s. 37(da). G H
- [36] Nor will the simultaneous application of the two presumptions prejudice or confuse the accused in his defence, because if he chooses to rebut the presumption of trafficking under s. 37(da), the question of rebutting the presumption of knowledge under s. 37(d) does not arise as knowledge is impliedly admitted by the accused, except that the drug was not for the purpose of trafficking. I

A [37] Conversely, if the accused chooses to put up the defence of having no knowledge of the drug in rebuttal of the presumption under s. 37(d), the question of proving that the drug was not for the purpose of trafficking in rebuttal of the presumption under s. 37(da) does not arise. And if he chooses to put up the defence that he was not even in custody or control of the drug, then the question of rebutting any presumption does not arise at all.

B [38] The deemed knowledge of the nature of the drug under s. 37(d) clearly applied against the respondent as the evidence is irrefutable that the bag containing the dangerous drugs was in his custody or under his control, ie, in his physical possession. In fact this was not disputed by the respondent either at the prosecution stage of the case or in his defence.

C [39] Since the defence that the respondent put up was the defence of 'innocent carrier', ie, carrying the bag without knowledge of the drugs inside the bag, he had no duty to prove that the drugs were not for the purpose of trafficking in rebuttal of the presumption under s. 37(da). His burden was to prove on the balance of probabilities that he had no knowledge that the bag that he was carrying contained dangerous drugs, namely heroin and methamphetamine, in rebuttal of the presumption under s. 37(d).

D [40] The learned trial judge's finding was that the respondent had succeeded in rebutting the presumption of knowledge under s. 37(d), which was a finding that the respondent had as a matter of fact no knowledge of the drugs. In so finding, the learned trial judge gave considerable weight to the fact that the drugs were hidden from view and that the respondent had placed full trust and confidence in Ibu Anita. This is what the learned judge said:

F Di dalam kes ini, dari fakta seperti yang dinyatakan di atas tentang cara mana dan bagaimana **dadah-dadah tersebut disembunyikan tersorok di dalam pelapik bagasi P11 yang dimiliki Tertuduh**, ia telah berjaya dipatahkan melalui keterangan oleh Tertuduh sendiri yang menyatakan bahawa apa yang dilakukan olehnya adalah semata-mata di atas kepercayaan serta yakinnya menurut perintah Ibu Anita, selaku majikannya. **Lantas, ianya telah berjaya dipatahkan oleh Tertuduh di atas prinsip imbalan kebarangkalian.** (emphasis added)

G [41] We must say at the outset that this was a misdirection: See *Zulfakar Mustaffah v. PP* [2001] 1 SLR 633 where the Court of Appeal of Singapore said at p. 639:

H In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

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22. We were unable to accede to this request. Whilst the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are firstly secured in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *PP v. Hla Win* [1995] 2 SLR 424 (at p. 438):

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In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by the trial judge from all the facts and circumstances of the particular case, giving weight to the credibility of the witnesses. (emphasis added)

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[42] The above passages had been quoted with approval by the Federal Court in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337. Thus it has become part of our law. It was also the learned judge's finding that the real trafficker was Ibu Anita and not the respondent. We reproduce below his reasons:

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Inferen yang boleh dibuat adalah tiadanya pengetahuan di pihak Tertuduh akan dadah-dadah yang tersembunyi tersebut. Ibu Anita telah dinyatakan oleh Tertuduh seawal perakaman percakapan amaranannya dilakukan (D74), iaitu selepas tangkapan ke atasnya dilakukan. Ini diulangi olehnya di dalam keterangan pembelaannya. Kedua-dua keterangannya di Mahkamah dan melalui D47 tentang Ibu Anita itu adalah konsisten. Ia bukan timbul secara tiba-tiba semasa Pembelaannya. Melalui D74 itu, dapat dilihat akan ketiadaan pengetahuan Tertuduh terhadap dadah-dadah yang disimpan secara tersorok di dalam P11. Kenyataannya telah merujuk kepada Ibu Anita sebagai petualang yang sebenar. **Ibu Anita adalah pengedar sebenar.**

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Dari fakta dan keterangan yang ditampilkan, apa yang jelas dan nyata ialah Tertuduh hanyalah mempunyai milikan yang pasif sahaja terhadap dadah-dadah tersebut. Tiada wujud keterangan untuk mengatakan yang dadah-dadah tersebut dibawa olehnya untuk diserahkan atau diedarkan kepada orang lain. Tertuduh terlalu percayakan Ibu Anita, majikannya. Ini jelas dapat dilihat melalui perlakuannya yang menerima beg P11 tanpa was-was. Ini ditambah lagi dengan fakta yang pekerjaan yang ditawarkan kepadanya itu sebagai tulen dan bersih memandangkan yang Agus dan Deden Haryato telah datang menemui ibu bapanya sewaktu ditawarkan kerja di Indonesia. Jelas, selain dari hanya memiliki secara pasif, tiada wujud apa-apa "overt act" untuk mengaitkan Tertuduh ini dari segi melakukan suatu pengedaran dadah berbahaya. (Lihat kes *Ooi Hock Khang v. PP* [2014] 1 LNS 685). (emphasis added)

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[43] From the above passages, it is plain and obvious that the reason why the learned judge came to the conclusion that the respondent was not a trafficker was because he had no knowledge of the drugs as he was merely taking instructions from Ibu Anita, the so-called real trafficker. He rejected

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A the prosecution's contention that the respondent's explanation was an afterthought, for the reason that the explanation was consistent with his cautioned statement.

B [44] It is of course for the learned trial judge, as a trier of fact, to come to a finding of fact on the question of whether the respondent was an innocent carrier, ie, carrying the drugs without knowledge, but such finding must be consistent with the truth and is not perverse having regard to the totality of the evidence and the reasonable probabilities of the case.

C [45] Consistency in evidence is not always a sure sign of truthfulness. It is the inherent probability or improbability of the explanation as tested against the totality of the evidence and the surrounding circumstances of the case that should guide the court in finding the truth, not mere possibilities conjured up to deflect the course of justice.

D [46] The court must not accept fanciful possibilities. It needs no emphasis that the public will lose confidence in the courts if the accused were to be acquitted at the slightest hint of doubt. That will make a mockery of the law. The law only requires the prosecution to prove its case "beyond reasonable doubt", not "beyond the shadow of doubt": *Miller v. Minister of Pensions* [1947] 2 All ER 372 per Denning J (as Lord Denning then was). It is as much a miscarriage of justice to acquit a guilty man as it is to convict an innocent one. In the eyes of the law both are an affront to justice.

E [47] Where the law imposes on the accused the burden of rebutting a statutory presumption, the quantum of proof required to discharge that burden is of course heavier than the evidential burden of merely to raise a reasonable doubt in the prosecution's case. The distinction is real and will lead to failure of justice if wrongly applied.

F [48] In a recent decision of the Federal Court in *Pendakwa Raya v. Herlina Purnama Sari* (Criminal Appeal No. 05-179-08-2015 dated 7 December 2016 which has yet to be reported) Raus Sharif PCA delivering the judgment of the court set out in very clear language the correct way to deal with the defence of 'innocent carrier' *vis-à-vis* the doctrine of 'wilful blindness'. To appreciate the full impact of the judgment on the issue of 'innocent carrier', we reproduce *in extenso* what His Lordship said at paras. 39-43:

G 39. As stated earlier, the Respondent's defence was that she was an innocent carrier and she had no knowledge of the impugned drugs that were found in the luggage bag she was carrying. The question is was she?

H 40. To answer this, we have to look at the facts. This is a case where the Respondent had accepted a job offer by a lady in Indonesia known as Vivian. Her job was to pick up golden thread sarees from Laos to bring

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back to Indonesia for sale. However, she did not fly directly to Laos. She was instructed by Vivian to go to Malaysia first to meet Vivian's friend by the name of Jo before proceeding to Laos. On arrival in Malaysia, the Respondent stayed at the hotel for two days. Thereafter she was picked up by Jo who took her to his apartment on the 17th Floor at Koi Tropica. The Respondent slept at the apartment that night. Before sleeping Jo gave her a luggage bag (P14) and told her to put all her belongings into the luggage bag. Jo also gave her two boxes and instructed her to give it to his friend in Laos. The Respondent put the two boxes in the luggage bag.

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41. As stated earlier, the High Court and the Court of Appeal were of the view that she was an innocent carrier. With respect, we disagree. We find the Respondent's story to be highly improbable. We are of the view that if she was to pick up the golden thread sarees from Laos and to take them back to Indonesia for sale, then why was there a need for her to make a stop-over in Malaysia? Two days later she was met by a person by the name of Jo whom she met for the first time then. She followed Jo to his apartment where she was given a new luggage bag and was instructed by Jo to put her belongings as well as the two boxes into the new luggage bag. While we agree that Vivian and Jo are not fictitious characters, we find no reasonable explanation proffered by the Respondent as to how the purchase was to be made. There was also no evidence proffered by the Respondent as to whom the two boxes were to be delivered to on reaching Laos.

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42. In our judgment, that the manner in which the impugned drugs were concealed in the two boxes which were found in the Respondent's luggage goes to show that the Respondent knew the contents of the two boxes. It is not enough for the Respondent to merely assert absence of knowledge. On the facts, there are many reasons for the Respondent to be suspicious that the luggage she was carrying contained impugned drugs. But she willfully shut her eyes. It is preposterous to accept the Respondent's defence that she had agreed to carry something in her luggage to help Jo, a total stranger, to have the two boxes delivered to Jo's friend in Laos.

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43. In our assessment, looking at the evidence in totality, the Respondent could not exculpate herself from her involvement in the trafficking of the seized drugs by saying that she had no knowledge or that she was an 'innocent carrier' in this transaction. In our view, she could not be 'innocent' when she voluntarily agreed to hand over the boxes to a third party that she hardly knew in another country without enquiring further as to the contents of the said boxes. The Respondent, without any such inquiry, which she would have been reasonably expected to make in any event, had agreed to give the boxes to someone just as a favour for her friend Vivian. The Respondent should have refused to carry out such an assignment if no satisfactory explanation as to their contents was forthcoming from Vivian whom she was in contact with. Her failure to do so makes her guilty of wilful blindness. (emphasis added)

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A [49] Compare the facts with the facts of the case before us. Before he came to Malaysia, the respondent worked as an assistant driver (“pembantu supir”) in Jakarta. He was offered a job as a cloths exporter by one “Dedeng” and “Abil” and was to be paid 5 million rupiah for a two week job. He said he would receive payment after the “barang” reached Indonesia. Initially he refused but finally agreed to take up the offer. He said this was the first time he was asked to be a cloths exporter.

B [50] When his passport was ready one week later, Abil brought him to see Ibu Anita at a mall in Jakarta. He said he did not know who she was but was told by Abil that she would bring him to Kuala Lumpur. After that he was given by Ibu Anita a flight ticket and 1.5 million rupiah and RM500 for his expenses while in Malaysia. According to the respondent, Ibu Anita left first for Malaysia.

C [51] Upon his arrival at the LCCT on 8 October 2012, the respondent contacted Ibu Anita by phone. She asked him to buy a taxi ticket and to proceed to Sunway Pyramid. He said he was carrying his own bag at that time, which contained two pairs of shirt, three pairs of trousers and two pairs of underwear. He arrived at Sunway Pyramid at about 1 or 2pm and was told by Ibu Anita to wait for her. Then at about 4-5 pm, Ibu Anita came to fetch him. After they had lunch, he was brought to the condominium where Ibu Anita was staying with her daughter and two African friends, both males.

D [52] He said he stayed at the condominium for six days and that throughout his stay there, he was not allowed to go out as Ibu Anita told him that she feared something untoward might happen to him as this was his first trip to Malaysia. He said the door to the unit was locked by Ibu Anita. He went on to testify that Ibu Anita told him to wait for the cloths to arrive but was not told where the cloths would come from.

E [53] Then in the early hours of 13 October 2012, he readied himself to fly back to Indonesia. After he had taken his bath, Ibu Anita gave him a bag containing cloths which he was to bring back to Indonesia. He was told by Ibu Anita that he needed to carry only that bag as his own bag was spoilt (“rosak”) and that she had thrown it away, although according to the respondent the bag was still in good condition. Ibu Anita then took a photograph of him with the bag. He was told that the photo was for the purpose of identifying him when the person in Surabaya, Indonesia come to collect the cloths upon his arrival from Malaysia.

F [54] After that he and Ibu Anita went down to the ground floor of the condominium where a taxi was already waiting to take him to the LCCT. According to the respondent, the bag containing the drugs was carried by Ibu Anita. It was only handed to him after he boarded the taxi. He said he only opened the bag on the way to the LCCT. When he arrived at the LCCT to check in, he called Ibu Anita and was told by her to check in the bag.

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[55] As he was checking in, the check in counter staff advised him to hand carry the bag as the weight did not exceed the maximum weight of 7kg for hand carried luggage but he insisted that the bag be checked in. He then paid RM105 for the baggage fee. The rest of his evidence relates to his arrest and the discovery of the drugs by the customs.

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[56] The storyline although not identical frame by frame has an uncanny resemblance to the storyline in *Herlina Purnama Sari (supra)*. If in *Herlina Purnama Sari* the respondent's job was to pick up golden thread sarees from Laos to bring back to Indonesia for sale, the respondent's job in the case before us was to pick up cloths from Kuala Lumpur to be "exported" to Indonesia.

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[57] In *Herlina Purnama Sari*, the Federal Court found the respondent's story to be highly improbable for the reason, amongst others, that if the respondent was to pick up the golden thread sarees from Laos and to take them back to Indonesia for sale, then why was there a need for her to make a stop-over in Malaysia? In the case before us, if the respondent was to collect the cloths from Kuala Lumpur for "export" to Indonesia, why was there a need for him to stay back and allowing himself to be locked up for six days at a total stranger's house?

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[58] There is no ring of truth in the respondent's claim that he was waiting for the cloths to arrive while staying at Ibu Anita's house. In all probability he was waiting for the drugs to arrive before carrying out his next assignment of delivering them to someone in Surabaya. Curiously when the bag was seized and examined at the LCCT, only a few cloths were found inside. There is no logic in "exporting" only a few cloths to Indonesia, and they were not even new cloths.

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[59] The respondent's insistence to check in the bag despite being advised by the airline staff to hand carry it is very telling. It irresistibly points to evidence of his fear that the drug would be detected by the scanning machine at another checkpoint as he entered the boarding area. To compound the matter, the respondent did not proffer any explanation as to why these ordinary cloths had to be imported from Malaysia and not readily available in Indonesia. And why must the cloths be "exported" to Surabaya and not to Jakarta where he started his journey from on 8 October 2012?

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[60] Having regard to the surrounding circumstances of the case, the "export" story is inherently improbable. It has to be a figment of the respondent's imagination. The export job was very suspicious from the start, yet for a payment of 5 million rupiah for a two week job which required him to travel to Malaysia for the first time in his life, the respondent closed his eyes to the obvious danger. The respondent was therefore guilty of wilful blindness, which nullified his defence of 'innocent carrier'.

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- A [61] As for the respondent's claim that he was locked up in Ibu Anita's house for six days, this is yet another story that is inherently improbable and should be dismissed as a deliberate lie. Having given him 1.5 million rupiah and RM500 for his expenses while in Malaysia, there was no reason for Ibu Anita to lock him up for six days in a row.
- B [62] If indeed Ibu Anita harboured fear that something untoward might happen to him if he was to venture outside the house while staying in Kuala Lumpur, how was it that she had no such fear when allowing the respondent to travel alone from Kuala Lumpur to Surabaya to hand over the bag to someone in Surabaya? The fear story simply does not add up with the truth.
- C [63] In finding Ibu Anita to be the real trafficker, it is patently clear that the learned trial judge believed the picture of innocence given by the respondent that he was a mere errand boy, doing the biddings of Ibu Anita and nothing more than that. Other than the respondent's self-serving cautioned statement which he regurgitated in court, there is absolutely no evidence for the learned trial judge to come to the conclusion that the respondent was as innocent boy doing errands for Ibu Anita.
- D [64] The testimony of Bapak Endro Sulaksono (SD2) called by the defence is not such evidence. More importantly, even if Ibu Anita was the real trafficker, that does not rule out the respondent as the other real trafficker.
- E After all the drugs were found in his possession and not in Ibu Anita's possession. Besides, it is only the respondent's word that Ibu Anita was the mastermind behind this criminal activity.
- F [65] The court must tread with caution before accepting this line of defence, which has become some sort of a mantra in drug trafficking cases. It is so easy to concoct and very difficult to rebut. That is the reason why Parliament deemed it fit to reverse the onus of proof by enacting s. 37(d) and s. 37(da) of the DDA. The threshold of truth must therefore be high enough to convince the court that the story is both reasonable and probable.
- G [66] In *Herlina Purnama Sari*, the trial judge in dealing with the issue of trafficking found that the respondent had custody and control as well as knowledge of the drug and further found that the respondent's act of transporting and carrying the drug constituted trafficking within the meaning of s. 2 of the DDA, much like the findings of the learned trial judge in the present case at the close of the prosecution's case.
- H [67] However, the learned judge in that case concluded that the respondent's act of merely transporting or carrying the bag containing the drug was not sufficient to constitute the offence of trafficking as he was of the view that there must be *mens rea* possession accompanied by some overt act. The learned judge in the case before us adopted a similar approach, as can be seen from the following two passages in his judgment:
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Dari rentetan peristiwa yang diuraikan, saya mendapati hanya kawalan dan jagaan terhadap bagasi P11 yang mengandungi dadah-dadah jenis Heroin dan Monoacetylmorphines sahaja yang berjaya dibuktikan oleh pihak Pendakwa. Lantas anggapan pemilikan dibawah Seksyen 37(d) Akta, terpakai. Untuk mengaitkan Tertuduh mempunyai pengetahuan terhadap dadah-dadah tersebut, ia agak sukar, Tiada keterangan ditampilkan untuk menunjukkan wujudnya sebarang "overt act" di pihak Tertuduh. Malah SP8, Pegawai Serbuan dan SP9 selaku Pegawai Penyiasat menyatakan Tertuduh dilihat 'bersahaja' tanpa menunjukkan sifat takut atau panic.

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Dari fakta dan keterangan yang telah ditampilkan, apa yang jelas dan nyata ialah Tertuduh hanyalah mempunyai milikan yang pasif sahaja terhadap dadah-dadah tersebut. Tiada wujud keterangan untuk mengatakan yang dadah-dadah tersebut dibawa olehnya untuk diserahkan atau diedar kepada orang lain. Tertuduh terlalu percayakan Ibu Anita, majikannya. Ini jelas dapat dilihat melalui perlakuannya yang menerima beg P11 tanpa was-was. Ini ditambah lagi dengan fakta yang pekerjaan yang ditawarkan kepadanya itu sebagai tulen dan bersih memandangkan yang Agus dan Deden Haryato telah datang menemui bapanya sewaktu ditawarkan kerja di Indonesia. Jelas, selain dari hanya memiliki secara pasif, tiada wujud apa-apa "overt act" untuk mengaitkan Tertuduh ini dari segi melakukan suatu pengedaran dadah berbahaya. (Lihat kes *Ooi Hock Khang v. PP* [2014] 1 LNS 685).

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[68] It is clear that the requirement of overt act weighed heavily in the learned judge's mind in determining whether the respondent had knowledge of the drugs and was trafficking in them. In this regard, the following observations by Raus Sharif PCA in *Herlina Purnama Sari* at paras. 36 and 37 are directly on point:

[36] The second error was the trial judge's finding that to constitute trafficking the *mens rea* possession must be accompanied by some overt act by the Respondent. It is unfortunate that the Court of Appeal had also committed a similar error in agreeing with the finding of the trial judge by holding that "without any evidence that would show an overt act of one or other of the kind specified in the definition of trafficking in section 2 of Act 234 or specifically of conveying, transporting, carrying, moving or promoting from one place to another in the sense of doing so to promote the distribution of the drug to another", the Respondent could not be a trafficker but merely had passive possession of the impugned drugs.

[37] **With respect, the proposition that there must be in all cases an overt act in order to constitute trafficking is misconceived. It would be contrary to the definition of trafficking as provided for under section 2 of the Act.** In the present case, there is no dispute that the Respondent did not try to do anything, when she was approached by PW4, to dissociate herself with the impugned drugs. (emphasis added)

A [69] The learned trial judge had therefore fallen into serious error in holding that an overt act must be proved before the two trafficking charges could be sustained. Even on this ground alone the learned judge's decision was liable to be set aside.

B [70] Having regard to the totality of the evidence and the surrounding circumstances and probabilities of the case, it was our finding that the respondent had failed to rebut the presumption of knowledge under s. 37(d) on the balance of probabilities, which was the defence that he chose to put up in answer to the *prima facie* case of trafficking established against him at the close of the prosecution's case. He therefore knew what he was carrying.

C [71] Nor had the respondent's explanation succeeded in raising any reasonable doubt in the prosecution's case on any other essential ingredient of the offences charged other than the deemed element of knowledge of the drugs. The trafficking charges had therefore been proved beyond any reasonable doubt.

D [72] There can be no argument that the respondent's act of knowingly carrying such large amount of dangerous drugs from one place to another without lawful authority was an act of trafficking within the meaning of s. 2 of the DDA, as rightly found by the learned trial judge at the close of the prosecution's case.

E [73] In view of our decision on the Public Prosecutor's appeal, we do not find it necessary to deal with the respondent's counter-appeal save to say that the issues raised would only be relevant if we had dismissed the prosecution's appeal.

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